

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERACTIVE COMMUNICATIONS)	
INTERNATIONAL, INC. d/b/a INCOMM ,)	
)	
Respondent,)	
)	Case No. 12-CA-155362
and)	
)	
KARINA NILDA RODRIGUEZ, an Individual,)	
)	
Charging Party.)	

RESPONDENT INTERACTIVE COMMUNICATIONS INTERNATIONAL, INC.'S
ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S MARCH 22, 2016
DECISION

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, as amended, Respondent Interactive Communications International, Inc. d/b/a InComm ("Respondent") files the following Answering Brief to Counsel for the General Counsel's Exceptions ("CGC's Exceptions") to Administrative Law Judge Keltner W. Locke's March 22, 2016 Decision.

I. HISTORY OF THE CASE

This matter was heard before the Honorable Keltner W. Locke, Administrative Law Judge ("the ALJ"), on January 13 and 14, 2016 in Jacksonville, Florida. The ALJ issued his decision on March 22, 2016 ("Decision"). On April 19, 2016, Respondent and CGC both filed their respective exceptions to the ALJ's Decision with the Executive Secretary.

II. RESPONSE TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS

CGC's Exceptions can be divided into two groups. Exceptions 1-4 seek to modify the ALJ's proposed order and Notice to Employees in order to clarify that employees may discuss wages, hours, or other terms and conditions of employment with other employees "during

working time.” To the extent that this proposed modification does not interfere with Respondent’s right to reasonably modify and/or enforce any existing rules aimed at prohibiting aural disruptions while employees are interacting with customers, Respondent does not generally oppose these Exceptions. On the other hand, Respondent objects to CGC’s Exception 5 because the ALJ properly refused to find and remedy an afterthought “violation” that was not specifically alleged in the initial Complaint or subject to later amendment.

A. CGC Exceptions 1–4.

The apparent purpose of CGC’s first four exceptions is simply to modify the ALJ’s proposed Notice to Employees to delete the phrase “during nonworking time” from the following sentences:

WE WILL NOT prohibit employees from discussing wages, hours, or other terms and conditions of employment with other employees while on our property *during nonworking time*.

WE WILL NOT threaten employees with discharge if they discuss wages, hours, or other terms and conditions of employment with other employees while on our property *during nonworking time*.

(CGC Exceptions, p. 8) (seeking “to simply remedy the violations found by deleting the phrase “during non-working time”)

Respondent does not object to the CGC’s simple remedy to the extent that it is intended only to signal to employees that they may discuss wages, hours, or other terms and conditions of employment on Respondent’s property while they are on scheduled breaks or while they are at

their desks and are not being disruptive or telephonically engaged with a customer.¹ It should be noted that “working time” for Respondent’s customer service representatives (“CSRs”) may be divided into four distinct subcategories, including when a CSR is: (1) on the clock at an assigned desk and engaged telephonically with a customer; (2) on the clock and engaged with a supervisor; (3) on the clock at an assigned desk but not engaged with a customer or supervisor; and (4) on the clock but on paid 15-minute breaks.

Respondent’s witness Patricia Kitler testified that employees are discouraged from “talk[ing] across” other customer service representatives’ cubicles or standing up and attempting to speak with employees on the other side of the cubicle during the shift; this relates to working time subcategory example (3). (Tr. 207, ll. 4–17.)² Respondent reserves its objection to CGC’s requested remedy with the understanding that the proposed order would not forbid implementation or enforcement of a rule prohibiting employees from engaging in the types of disruptive working time communications that Ms. Kitler described in her testimony.

B. CGC Exception 5.

The ALJ correctly declined to make any findings regarding the lawfulness of statements allegedly made by Klea Jackson that the CGC did not include in the Complaint. CGC never attempted to amend the Complaint to add these allegations, either before or during the two-day hearing. Neither the CGC nor Counsel for Respondent ever specifically asked Patricia Kitler, Respondent’s only witness, whether Jackson made the alleged statement. Indeed, Kitler never

¹ Respondent continues to respectfully urge the Board to grant its Exceptions to the ALJ’s decision, which would make CGC’s exceptions moot. Specifically, the Board should hold that Charging Party’s “sketchy,” “self-contradictory,” and “contrived” testimony did not support a finding that Klea Jackson made the statements that formed the basis of the proposed order and remedy. (ALJ Decision, p. 3, ll. 16–19; p. 4, l. 17; p. 17, l. 28.)

² Citations to the Hearing transcript (“Tr.”) include the applicable page and line numbers.

specifically addressed the alleged statement in her testimony. For these reasons, the Board should reject Respondent's Exception 5.

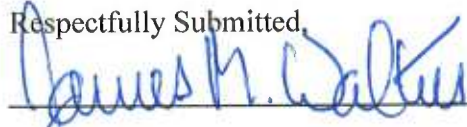
As an initial matter, CGC could have easily amended the Complaint to add this allegation. CGC was well aware of the process for amending the Complaint; CGC amended the Complaint once prior to the hearing. CGC could have also moved to amend the complaint orally during the hearing, a common practice particularly during multi-day hearings such as this one.

The only case that CGC cites to support this exception notes that the Board should be more inclined to find and remedy a violation that was not included in the complaint where "the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses." *Pergament United Sales*, 296 NLRB 333, 334 (1989) *enfd.* 920 F.2d 130 (2d Cir. 1990). Kitler never testified that Jackson told Rodriguez "that we were a non-union workplace, so protected concerted activity didn't apply." Kitler did not specifically testify about this allegation—which was not included in the complaint, and which CGC never specifically asked Kitler about on cross-examination, and further which CGC never orally moved to add to the complaint. Kitler did, however, testify that she never "hear[d] Klea [Jackson] say anything that could be interpreted as prohibition against [Charging Party] discussing with co-workers wages, hours, or other terms and conditions of employment." (Tr. 192, ll. 6–12.)

The Board may, under its *Pergament* doctrine, find an unalleged violation "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Id.* As described above, this issue was not fully litigated because neither CGC nor Respondent's counsel specifically asked Kitler whether Jackson stated "that we were a non-union workplace, so protected concerted activity didn't apply." In contrast, the Board in *Pergament* held that the issue there was fully litigated where "Respondents' own witnesses corroborated the General

Counsel's witnesses and admitted [the underlying facts that proved an unalleged violation of the Act]." *Id.* Such corroboration by Respondent's witness, Patricia Kitler, is utterly lacking. Thus, the parties did not fully litigate the issue and the Board should reject CGC's request to find and remedy this unalleged violation of the Act.

Respectfully Submitted,



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For FISHER & PHILLIPS LLP
Counsel for Respondent

Dated this 3rd day of May, 2016.

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2016 I served the foregoing **ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S MARCH 22, 2016 DECISION** on the following individuals by the following means:


By Electronic Filing:

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